IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 13TH SEPTEMBER 2007 / 22ND BHADRA 1929

WP(C).No. 8364 of 2007(U)

OS.203/2004 of DISTRICT COURT, KASARAGOD
CMA.49/2005 of PRL.MUNSIFF, KASARAGOD

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PETITIONER:

ABDUL HAMEED, S/O.ZAINUDEEN,
RESIDING AT PALIKKALADKA, PATLA VILLAGE,
KASARAGOD TALUK, KASARAGOD DISTRICT, REPRESENTED
BY HIS POWER OF ATTORNEY HOLDER ABDULRAHIMAN,
S/O.ZAINUDEEN, RESIDING AT PALIKKALADKA, PATLA
VILLAGE, KASARAGOD TALUK, KASARAGOD DISTRICT.

BY ADV. SRI.D.KRISHNA PRASAD
SRI.D.NARENDRANATH
SRI.M.HARISHARMA
SRI.T.P.ELDHOSE
SMT.O.K.SANTHA

RESPONDENTS:

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1. MARIYAMATH ANASA, D/O.MAHAMOOD,
RESIDING AT BANNUR, MADHUR VILLAGE,
KASARAGOD TALUK, KASARAGOD DISTRICT.

2. P.A.HARIS, S/O.ABDULLA,
RESIDING AT PALIKKALADKA, PATLA VILLAGE,
PATLA POST, KASARAGOD TALUK, KASARAGOD DISTRICT.

BY ADV. SRI.SOJAN MICHEAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C) 8364/07

Appendix

Petitioner's Exts:

Ext.P1 true copy of plaint dated 20.5.2004 in O.S. 203/2004 on the file of the Munsiff's Court, Kasaragod.

Ext.P2 true copy of judgment dated 11.10/2004 in O.S.203/04 on the file of the Munsiff's Court, Kasaragod.

Ext.P3 true copy of decree in OS 203/04 dated 11.10.2004 on the file of the Munsiff's Court, Kasaragod.

Ext.P4 true copy of the order dated 4.4.2005 in I.A. Nos.446/05 and 447/05 in OS 203/04 on the file of the Munsiff's Court, Kasaragod.

Ext.P5 true copy of judgment dated 16.8.2006 in CMA 49/05 on the file of the District Court, Kasaragod.

Ext.P6 true copy of IA 449/2006 in CMA 49/05 dated 8.11.2006 on the file of the District Court, Kasaragod.

Ext.P7 true copy of IA 421/2006 in CMA 49/05 dated 2.11.2006 on the file of the District Court, Kasaragod.

Ext.P8 true copy of the order dated 4.12.2006 in IA 449/2006 in CMA 49/05 dated 4.12.2006 on the file of the District Court, Kasaragod.

Ext.P9 true copy of the order dated 4.12.2006 in IA 421/20065 in CMA 49/05 dated 4.12.2006 on the file of the District Court, Kasaragod.

M.N.Krishnan, J.

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W.P(C).No.8364 of 2007

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Dated this the 13th day of September, 2007.

JUDGMENT

This Writ Petition is filed seeking to set aside Exts.P5, P8 and P9 and to restore Ext.P4 order. A suit was filed for damages by the present writ petitioner against two defendants. By virtue of Ext.P2 judgment, the court granted a decree in favour of the plaintiff and against the second defendant for realisation of Rs.25,000/- as damages. Thereafter, the first defendant moved two applications, I.A.No.446 and 447 of 2005 to condone the delay and to set aside the ex parte decree. By Ext.P4 order, the court below dismissed the application. Against that common order, C.M.A.No.49 of 2005 was filed before the District Judge, Kasaragod. The District Judge in paragraph 3 concurred with the finding of the court below. But immediately thereafter jumps to a finding that since both lawyers appearing agreed for allowing the appeal on payment of cost, he allowed the appeal on payment of Rs.2,000/-. But in the process, he dismissed one application and allowed the other application. To review the same, I.A.No.449 of 2006 was filed (Ext.P8). There was another application also filed as I.A.No.420 of 2006 wherein the petition was filed to correct a mistake. Because the court dismissed one I.A. and allowed

another I.A., it was corrected. The application for review, which is I.A.No.414 of 2006 was filed for the purpose of contending that no such concession has been made by the lawyer for setting aside the ex parte decree. The learned District Judge disposed of I.A.No.449 of 2006 according to the observations in I.A.No.421 of 2006. The parameters for consideration of both the I.As. were totally different and the District Judge could not have disposed of I.A.No.449 of 2006 in that way.

2. Now with all these facts, let us prima facie find out whether an application to set aside the ex parte decree by the first defendant is maintainable. Order 9 Rule 13 of C.P.C. only contemplates a situation of setting aside en ex parte decree when it is passed against a defendant. In the case on hand, there is no ex parte decree passed against the first defendant and there is only a decree against the second defendant. There cannot be any grievance for the first defendant against the passing of such decree. So that should have weighed with the mind of the appellate court as it has been considered by the trial court. Both the courts concurrently found that there is ample evidence to show that notice has been served on the first defendant. So there has been proper service of notice as well on merits. So, the ground urged for setting aside the ex parte decree is not proved. But it is disproved by the documents available in the case records. So, firstly on the technical question of non-availability of the provision to set aside the ex parte decree on account of the fact that there is no decree and secondly on merits

also as there are no grounds to set aside the ex parte decree. The decision rendered by the District Judge is liable to be interfered.

3. Therefore, I set aside the main order in the C.M.A. as well as the interim orders in the I.As. passed and restore the original oder of the Munsiff passed in I.A.No.446 of 2005 and I.A.No.447 of 2006 whereby he had dismissed those applications.

Writ Petition is disposed of accordingly.

M.N.Krishnan,
Judge.

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